Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

GOLDEN RAINBOW FREEDOM FUND,

Petitioner,

v.

JOHN P. ASHCROFT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. ALBERTSON
Counsel of Record
FORSBERG & UMLAUF, P.S.
900 Fourth Avenue, Ste. 1700
Seattle, Wash. 98164
(206) 689-8500

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Petitioner Golden Rainbow Freedom Fund is a Washington limited partnership engaged in the development of commercial real estate. Its primary sources of investment capital are immigrant investors who are granted visas under the Immigrant Investor Pilot Program, established by the Congress in 1995 and administered by the Immigration and Naturalization Service (INS). An immigrant investor visa applicant invests $500,000 in an approved program and is granted conditional permanent residence. At the end of a two-year period, the immigrant applies to have his or her status adjusted to permanent resident. If the INS determines that the investor has complied with the approved program and the statutory purpose of the program, the conditional status is removed. Petitioner's investment program was approved by the INS, as were the individual investor's visa petitions that incorporated the program. Based on those approvals, petitioner invested several million dollars in the development of a number of properties, and petitioner's investors moved to the United States, many with their families. Beginning in 1997, however, the INS radically changed the regulatory standards for the program, and announced the new standards in the course of internal adjudications instead of by notice and comment rulemaking as required by the Administrative Procedure Act. The INS then directed that the new standards be applied retroactively to a backlog of visa petitions pending before the agency. The application of these new standards adversely affected petitioner's investors as they sought to adjust their status, since they had invested in petitioner's fund in good-faith reliance on the INS' prior approval of both the investment program and their individual visa

QUESTIONS PRESENTED – Continued

petitions. As a result, petitioner has suffered an outflow of investment capital as its investors seek to withdraw their funds in the expectation that they will face removal proceedings by the INS, and has had to curtail its development activities and commence liquidation of several of its investment properties.

The questions presented, as to which the courts of appeal are in conflict, are:

1. May an administrative agency effect a substantial change in its regulatory standards, without prior notice of and an opportunity to comment on the proposed changes as required by the Administrative Procedure Act, 5 U.S.C. § 551(4) and 5 U.S.C. § 553, when that change contradicts the plain language of the regulations and reverses a long-standing and well-established interpretation of the agency's regulations?

2. Does an agency approval of an investment program, the subsequent approval of numerous visa petitions incorporating that investment program, and the resulting investment of several million dollars in reliance on those approvals, constitute a "well-established interpretation" of the agency's regulations?

3. Did the INS' retroactive application of new regulatory standards to the petitioner's already-approved investment program constitute arbitrary and capricious decisionmaking?

RULES 29.6 AND 14.1 STATEMENT

Petitioner Golden Rainbow Freedom Fund is a limited partnership organized under the laws of the State of Washington. American Retirement, Inc., owns more than ten percent of the interest of the Fund.

Respondent John D. Ashcroft is the Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Golden Rainbow Freedom Fund respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Memorandum Decision of the court of appeals (App. 1-3)[1] and the order denying petition for rehearing (App. 9) are unreported. The opinion and judgment of the District Court (App. 4-8) were not reported. The four decisions of the INS Administrative Appeals Office that form the basis for the agency actions at issue are reported as Interim Decisions 3359, 3360, 3361, and 3362.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 10-28) are pertinent provisions of Section 1153(b)(5) of Title 8, United States Code; Sections 551(4) and (5) and Sections

[1] "App." Refers to the separately bound appendix to this petition.

553(b) and (c) of Title 5; and Sections 204.6(e), (j), and (m) of Title 8, Code of Federal Regulations.

STATEMENT

A. Statutory Background

This case concerns the INS' administration of a visa program intended to encourage investment in the United States by potential immigrants. Section 203(b)(5) of the Immigration and Naturalization Act of 1990, 8 U.S.C. §1153(b)(5), created a new preference allocation of visas for a category of immigrants described in the statute as "employment creation" immigrants, commonly referred to as the "EB5 visa." Under Section 203(b)(5), visas were set aside for potential immigrants who had invested, or were in the process of investing, a specified amount of money in a new or ongoing enterprise, and which would create full-time employment for at least 10 "qualified employees." An immigrant is granted conditional permanent resident status for a period of two years. If the immigrant remains eligible for the two-year period, by maintaining the investment and its resulting job creation activity, he or she may petition to have the conditional status removed at the end of the two-year period, by filing an I-829 petition. The INS promulgated final rules implementing the immigrant investor provisions of Section 203(b)(5) on November 29, 1991, 56 Fed. Reg. 60897.

The "Immigrant Investor Pilot Program" (hereinafter the "Pilot Program"), in effect a sub-program of the EB5 program, was established by the Congress in 1992. It differs from the original program in that it is intended to encourage potential immigrants to invest in "regional

centers," entities organized "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Section 610, Department of Justice and Related Agencies Appropriations Act, 1993, Pub.L. 102-395, 106 Stat. 1828, 1874 (hereinafter 1993 Appropriations Act). The regional center can be a company, a branch of government, or other entity established for the purpose of investing immigrant capital into designated areas approved by the INS. The requirement in the original program that each individual investment create ten jobs for qualifying employees was expressly relaxed, with investors in a "regional center" instead permitted to set forth in their applications evidence of indirect job creation by their investments. The INS promulgated an Interim Rule governing the Immigrant Investor Pilot Program on August 24, 1993, 58 Fed. Reg. 44606.

The Interim Rule also provides that, in lieu of strict adherence to the "10 jobs created" requirement of the original immigrant investor program, "reasonable methodologies" could be used to estimate the number of jobs created by investment in a regional center. These methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods and services to be exported, and "other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment." 8 C.F.R. § 204.6(m)(3)(v).

In addition to the INS' published regulations cited above, additional guidance on the EB5 program was provided by legal opinions published by the INS' Office of General Counsel. An opinion from that office dated September 10, 1993, encouraged the formation of venture

capital funds, or similar entities that serve as conduits for investing immigrant investor capital into regional centers, by concluding that pooled investment programs fully satisfied the letter and spirit of the employment-creation statute. The opinion also concluded that an investor's capital was placed "at risk," for purposes of 8 C.F.R. §204.6(j)(2), even if the investor and the enterprise in which he or she invested had an agreement for the sale of the investor's interest in the enterprise (such as by redemption, third-party purchase, or otherwise) after the two-year conditional period had been satisfied. *Id.* This further encouraged immigrant investment, by permitting the creation of specific, known "exit strategies" for the investor.

In another opinion dated June 27, 1995 the General Counsel encouraged the extension of credit to immigrant investors by concluding that the INS' regulations did not require that the indebtedness of an investor (such as a promissory note backed by the investor's own assets) meet the requirements of a secured transaction under Article 9 of the Uniform Commercial Code.

Further guidance was also provided, on a case-by-case basis, to individuals who were organizing investment programs for potential immigrant investors. In the specific case of petitioner, for example, the INS' Chief of Immigrant Branch Adjudications, in answer to a query from the organizer of GRFF, stated in a letter dated August 10, 1995 that venture capital funds *were* a qualifying investment under the Pilot Program, if a petitioning alien could show that "the fund infuses capital into export-generating businesses, which, in turn, create jobs."

Petitioner's subsequent application to the INS for designation as a "regional center" in the Pilot Program described petitioner's business plan (development or renovation of commercial/warehouse properties for sale or lease to manufacturing and export-oriented companies), the organizational structure of GRFF (a series of limited partnerships open to ten investors for an investment of $500,000 each, payable either in cash or by a substantial down payment with the balance evidenced by the terms of a subscription agreement), and projected the number of new jobs that would be created by a typical development project financed by the Fund. All of the current investors have fully invested $500,000.

On February 5, 1996, the INS' Acting Assistant Commissioner, Adjudications, designated petitioner as a "regional center" under the Immigrant Investor Pilot Program. A subsequent amendment to petitioner's "regional center" designation clarified petitioner's primary investment program as being development in (1) the City of Seattle's Neighborhood Reinvestment Area, an aging industrial area located immediately south of downtown Seattle, which had been designated by the State of Washington and the federal government as a "Community Empowerment Zone" ("CEZ") and (2) the "Enterprise Community" ("EC"), designated and administered by the U.S. Department of Housing and Urban Development, encompassing portions of Seattle's Central Area, Southeast Area, Duwamish Area and Delridge Area. On October 25, 1996, the INS approved the amended applications and again designated petitioner as a regional center under the Immigrant Investor Pilot Program.

Between August, 1996, and mid-1998, approximately 90 immigrants who were potential investors in petitioner's

regional center applied for visas at overseas consular posts. The applications supporting these petitions contained substantially the same information regarding petitioner: documentation of its designation as a "regional center," its most recent audited financial statements, copies of the applicable limited partnership agreement, and the most current information on the unemployment rate in the regional center. Throughout this period, petitioner received repeated assurances that its investment program was in full compliance with the law, principally through the continued approval of these immigrant investor's visa petitions. In addition, on October 20, 1997, the INS' Office of Adjudications distributed a memorandum to its field offices to guide them in their adjudication of petitions filed by immigrant investors. These guidelines reiterated the INS' prior practice of approving immigrant investors' participation in investment funds with the same features as exist in the Fund, including redemption agreements, reasonable management fees, and promissory notes.

Of the approximately 90 applicants for permanent resident status under petitioner's investment program, the INS approved approximately 40 of the petitions, and conditioned the petitioners' permanent resident status for the statutory two-year period. Based on those approvals, the investors released their funds to petitioner, moved themselves and their families from their home countries, and established residence in the United States. Most are now nearing the end of their two-year conditional residence period, or have already completed the conditional residence period and have I-829 petitions pending before the INS to have the conditions removed. Petitioner, in turn, invested those pooled funds in the architecture,

engineering, and construction costs necessary to refurbish or construct commercial properties.

In 1996, the INS had become concerned about features of some investment programs that were being submitted for its approval, and whether those features complied with the program's statutory authority. These features included passive versus active participation in an investment, pooled investments, and the use of promissory notes.

It was initially thought these concerns could be dealt with by drafting and issuing written guidance to the INS' field offices, but the INS program officer was advised by the agency's General Counsel that such changes to program standards had to be accomplished by means of a rulemaking proceeding, and that she thereupon began drafting regulations. Accordingly, the program officer prepared an initial draft of the regulations, totaling 37 pages, on December 17, 1996; a 59-page draft on January 15, 1997; and a 66-page draft on March 21, 1997. To date, the INS has never promulgated those regulations

Instead of commencing a rulemaking proceeding, however, the INS opted for a more expedient approach to changing the rules governing the EB5 program. On or about December 1, 1997, the INS instructed its field offices and State Department consulates overseas to stop the processing of immigrant investor petitions, pending the issuance of guidance on adjudicating the complex financial arrangements found in some visa petitions. This "guidance" was provided by the issuance of a memorandum by the General Counsel on December 19, 1997, which examined many of these "complex financial arrangements" and re-defined the agency's interpretations of such matters as the "fair market value" of a promissory note

used as part of an investment, prohibited the payment of management fees or commissions to the promoters of investment programs, effectively banned the use of pooled investment funds as an investment vehicle, and made other changes to the agency's past rulings on features of the EB5 program.

Then, a number of pending visa petitions were "certified" to the INS' Administrative Appeals Office (AAO), a branch of the same agency division that adjudicates visa petitions, for adjudication as "precedent decisions" pursuant to the standard set forth in the General Counsel's memorandum. Under the INS' regulations, these "precedent decisions" would then be binding on subsequent adjudications by INS officers and employees.

The result of this process was that in late June and July 1998, the Associate Commissioner for Examinations issued four "precedent decisions" that were to guide the adjudication of the remaining petitions. *Matter of Soffici*, Interim Decision 3359 (June 30, 1998); *Matter of Izumii*, Interim Decision 3360 (July 13, 1998); *Matter of Ho*, Interim Decision 3362 (July 31, 1998); *Matter of Hsiung*, Interim Decision 3361 (July 31, 1998). These decisions are referred to collectively as the *Izumii* decisions.

Each of the *Izumii* decisions added requirements for visa petitioners that went beyond the scope of the existing law, contradicted provisions of the promulgated regulations, and contradicted the INS' established precedent on these matters. For example, before the *Izumii* decisions, an EB5 petitioner's investment in a "pooled investment fund" (where multiple investors invested in a fund, which in turn invested in more than one commercial enterprise

in a regional center) would be approved, whereas after the *Izumii* decisions, it would not – even if an investor (such as petitioner's) had kept his or her money in the fund for two years, in reliance on the INS' original approval of their petition.

Similarly, before the *Izumii* decisions, if part of an investment was in the form of a promissory note, there was no requirement that any security interest in the note be perfected in accordance with Article 9 of the UCC, or indeed in accordance with any requirement. But after *Izumii*, such notes were required to be perfected in accordance with the immigrant's home jurisdiction – even if the original promissory note had originally been unsecured when the investment was approved at the beginning of the petitioner's two-year conditional residence period.

Before the *Izumii* decisions, if part of an investment was in the form of a promissory note, the only requirement in the INS' regulations was that it be valued at "fair market value." After *Izumii*, a promissory note was required to be discounted to present value, and further discounted to reflect the potential cost of enforcing a U.S. judgment in a foreign court – even if the undiscounted note was approved at its then fair market value at the beginning of the investor's conditional residence period.

Before the *Izumii* decisions, investment programs containing redemption or "buy-back" features were approved by the INS, whereas after *Izumii*, investment programs containing such redemption features are not approved – and this prohibition has been and will be applied to investors whose investment programs had been approved by the INS at the time their visas were approved

and they commenced their two-year conditional residence period.

Before the *Izumii* decisions, visa petitioners were required to submit documentation, in a manner specifically prescribed in the INS' regulations, of the source of their investment funds. After the *Izumii* decisions, visa petitioners were required to submit much more extensive documentation, sufficient to trace the source of every dollar they had invested – even though the agency had approved their original documentation at the time their visa was approved, and even if compliance with the new requirement meant that an immigrant had to return to their home country several years after leaving, and reconstruct their financial history from scratch.

Before the *Izumii* decisions, the INS regulations allowed an investor to be a limited partner, as defined in the Uniform Limited Partnership Act. After the *Izumii* decisions, investors were required to be "actively engaged" in management, which could void their status as limited partners.

Following the issuance of the *Izumii* decisions, the INS proceeded to apply the new standards to several hundred petitions that were backlogged before the agency with striking results – of the 587 petitions immediately adjudicated pursuant to the *Izumii* decisions, all but two were denied. In the case of the petitions of the Fund's investors, the new requirements added by the *Izumii* decisions were invoked to deny or revoke their petitions on a number of grounds. Among the grounds cited by the INS were: (1) the prohibition, first announced in *Izumii*, on payment of management fees to the Fund, although such fees had been fully disclosed to, and approved by, the INS

when the petition was filed; (2) the prohibition, also first announced in *Izumii*, on redemption or "buy-back" features in the petitioner's investment program; (3) the requirement, first announced in *Izumii*, that the promissory note utilized by the investor be discounted to present value; and (4) the failure of the petitioner to meet the requirement, first announced in *Izumii* and *Matter of Soffici*, that he be able to trace the source of all funds used for his investment.

The adjudications of visa petitions submitted on behalf of the Fund's investors resulted in the immediate revocation of approximately 30 petitions that had already been approved. Because petitioner's investment contract and escrow agreement required those investors' funds to be released by the escrow agent to the fund upon approval of their respective visa petitions, many of the investors whose petitions were revoked demanded (and received) the return of their money from petitioner. Of the approximately 40 investors who were granted conditional residence before the *Izumii* decisions, 10 grew fearful of losing their permanent resident status at the end of their two-year period, and demanded the return of their funds. Petitioner refunded between $2 million and $3 million to those investors, and that in order to meet those demands and anticipated future demands, has placed several of its investment properties on the market. This financial burden, due wholly to the INS' abrupt revision of the standards governing the EB5 program, has had a direct and adverse effect on the Fund's ability to carry on its property development activities.

Moreover, the INS has refused to allow either petitioner or its investors to re-structure their investment program in a manner that would comply with the new

requirements. For example, all of petitioner's investors have made a full cash investment in the fund – thereby eliminating the INS' disfavor, first announced in the *Izumii* decisions, of investment program in which investors could make a partial down payment, with a promissory note for the balance. However, since the INS has announced that the individual investments must be judged as they were originally made (although judged retroactively under the subsequently-adopted *Izumii* standards), and therefore cannot be re-structured.

B. Proceedings Below

On May 12, 1999, petitioner filed its Complaint and Motion for Preliminary Injunction in the United States District Court for the Western District of Washington. The complaint alleged that the INS' adoption of new standards to govern the immigrant investor visa program violated the Administrative Procedure Act's notice-and-comment requirements for promulgation of substantive rules. Petitioner also alleged that the new standards were contrary to the legislation authorizing the immigrant investor program, that the revision of the program standards was arbitrary and capricious and violated due process, and also constituted an uncompensated taking of the economic worth of the GRFF.

After briefing by the parties, the District Court denied petitioner's motion for a preliminary injunction by order dated August 19, 1999. On August 10, 2000 petitioner filed a motion for summary judgment. On August 11, 2000 the INS filed a cross-motion for summary judgment. The District Court issued an order granting the INS' motion for summary judgment, and denying petitioner's motion for

summary judgment on September 13, 2000. On September 18, 2000, the Clerk of the District Court entered judgment in favor of the INS and against petitioner, pursuant to the Court's September 13, 2000 Order. On November 16, 2000, petitioner filed a notice of appeal. On January 18, 2001, appellant filed a motion with the Court of Appeals for the Ninth Circuit that its appeal be heard by the same panel and at the same time as the appeal in a related case currently before the court, *R.L. Investment Limited Partners v. Immigration and Naturalization Service*, No. 00-15627. The Court of Appeals granted that motion on January 31, 2001, and oral argument was heard on November 6, 2001.

The Court of Appeals, in an unpublished memorandum decision dated November 26, 2001, affirmed the District Court's decision on the basis of its decision in the *R.L. Investment Limited Partners v. INS*, 273 F.3d 874 (9th Cir. 2001). The latter decision expressly adopted the reasoning of the District Court decision in *R.L. Investment Limited Partners v. INS*, 86 F.Supp2d 1014 (D.Hawai'i 2000).

REASONS FOR GRANTING THE PETITION

This court should grant review because the circuits are split as to the standard for what constitutes an administrative agency's settled interpretation of its statutory authority, the departure from which requires rulemaking under the Administrative Procedure Act, and because the Ninth Circuit reached a decision in this case that is erroneous as a matter of statutory interpretation.

A. The Circuits Are Split Over the Standard Required for Rulemaking When An Agency Changes Its Interpretation of a Statute

The District Court below rejected petitioner's contention that the INS' prior memoranda, rulings, and approvals of visa petitions for petitioner's investors did not constitute a consistent expression of agency policy, which required rulemaking in order to effect a change in that policy. App. at 5. It based this holding on the Ninth Circuit decision in *Chief Probation Officers v. Shalala*, 118 F.3d 1327 (9th Cir. 1997), which held *inter alia* that changes in regulatory agency interpretations, "which themselves did not go through formal rulemaking procedures, cannot be regulations having the force of law. The prior approvals simply represented the Agency's prior (short-lived) interpretation of the statute." 118 F.3d at 1334. The rule of *Chief Probation Officers* in its simplest form, is that new declarations of policy do not trigger the APA's rulemaking requirement unless they explicitly contradict an existing regulation that has the force of law. 118 F.3d at 1334. Accordingly, the district court held that the INS was free to change its interpretation of the statute without going through a rulemaking proceeding. App. at 7. The district court in *R.L. Investment Limited Partners*, reached the same conclusion, 86 F.Supp.2d at 1025, which was then adopted by the court of appeals in affirming both petitioner's appeal and the appeal in *R.L. Investment Limited Partners*, 273 F.3d 874; App. at 2.

By contrast, in *Alaska Professional Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), the Court of Appeals for the District of Columbia Circuit undertook a much more pragmatic and realistic analysis of how an

individual or a business entity relies on the "common law" of an administrative agency in structuring its business, and how a change in that "administrative common law" triggers the requirement of notice and comment rulemaking under the APA.

In *Alaska Professional Hunters Ass'n* the appellants were hunting and fishing guides in Alaska who flew light aircraft as part of their guiding services. Since 1963, guides in the state had been consistently advised by the Alaska Region of the FAA that they were not governed by the agency's regulations for commercial pilots, but were instead only subject to the general rules governing private aviation. In 1998, however, the FAA's headquarters in Washington, believing that the Alaska Region's long-standing advice was premised on an erroneous reading of an old Civil Aeronautics Board decision, caused a "Notice to Operators" to be published in the Federal Register. That Notice informed Alaska guide pilots that they were now subject to the commercial aviation regulations. The guides sought judicial review, alleging that the FAA was trying to evade its rulemaking obligations under the APA. The FAA's principal defense was that the "Notice to Operators" was merely an interpretive rule, and therefore exempt from the notice and comment procedures of the APA.

The D.C. Circuit disagreed, ruling that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." 177 F.3d at 1034. Nor was the court swayed by the agency's argument that the Alaska Region's advice to the guide pilots represented a "local enforcement omission, in conflict with the agency's policy in the rest of the country," finding that

> Those regulated by an administrative agency are entitled to 'know the rules by which the game will be played.' *See*, Holmes, *Holdsworth's English Law*, 25 Law Quarterly Rev. 414 (1909). Alaska guide pilots and lodge operators relied on the advice FAA officials imparted to them – they opened lodges and built up businesses dependent on aircraft, believing their flights were subject to [general aviation requirements] only. *Cf. Paralyzed Veterans*, 117 F.3d at 587. That advice became an authoritative departmental interpretation, an administrative common law applicable to Alaskan guide pilots. The FAA's current doubts about the wisdom of the regulatory system followed in Alaska for more than thirty years does not justify disregarding the requisite procedures for changing that system.

177 F.3d at 1035.

The district court sought to distinguish the rule of *Alaska Professional Hunters* on the grounds that the EB5 program did not have the same "long-standing history as the system in [*Alaska Professional Hunters*]," and that the lack of any "binding decisions" regarding the EB5 program did not set forth a "settled course of adjudication from which an irrational departure is not allowed." App. at 6. However, the interpretations of the EB5 regulations that were relied upon by petitioner and its investors were both long-standing and specific to petitioner's program. These interpretations were not "informal nonauthorative" declarations, as were the "prior interpretations" alleged by the appellants in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997) (speech by mid-level agency official).

The district court's dismissal of the consequences of the INS' decision making, by characterizing it as "non-binding" also overlooks the real effects of the agency's prior actions. In a more recent case, the D.C. Circuit addressed an agency's argument that a "guidance" document it had issued was not subject to the APA's rulemaking requirements because it was not "binding." In *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), the court of appeals noted that:

> A "legislative rule" is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act. If this were all that "binding" meant, EPA's Periodic Monitoring Guidance could not possibly qualify: it was not the product of notice and comment rulemaking in accordance with the Clean Air Act, 42 U.S.C. § 7607(d), and it has not been published in the Federal Register. But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. . . . If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

208 F.3d at 1021 (footnotes and citations omitted). Here, petitioner clearly viewed the INS' designation of it as a Regional Center as binding, in that any failure to comply with the terms of the approved business plan could result

in termination of its participation in the Immigrant Investor Pilot Program. 8 C.F.R. §204.6(m)(6). Equally, the visa holders who invested in petitioner's Regional Center on the basis of the INS' approval of their applications viewed the terms of their visas as "binding."

The district court's findings also disregarded the important fact that, over the course of nearly five years, petitioner and its investors made large, and largely irretrievable, investments in the form of property purchases, architecture and engineering fees, and construction costs in justifiable reliance on the agency's opinion letters and memoranda; the designation of the petitioner as a Regional Center by the INS; and the numerous approvals of program-specific visa petitions submitted by petitioner's investors by the INS.

A result similar to *Alaska Professional Hunters Ass'n* was reached by the Ninth Circuit itself in *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), which invalidated a new rule that the Department of Housing and Urban Development (HUD) had announced by adjudication, because the rule was found to be broad, general, and prospective in application, and because it was inconsistent with and departed abruptly from HUD's previous interpretations. The court of appeals was especially troubled that "HUD has made inconsistent and misleading representations to those regulated . . . and, in so doing, has led them down the garden path." 88 F.3d at 747. It went on to state:

> The disadvantage to adjudicative procedures is the lack of notice they provide to those subject to the agency's authority. While some measure of retroactivity is inherent in any case-by-case development of the law, and is not inequitable

> per se; this problem grows more acute the further the new rule deviates from the one before it. Adjudication is best suited to incremental developments to the law, rather than great leaps forward. The APA contains numerous mechanisms, such as the notice and comment rulemaking procedure, by which the public is given notice of proposed changes before they occur. *See generally* APA § 552, 553, 557. For this reason, the Supreme Court has concluded that "rulemaking is generally a better, fairer, and more effective method of announcing a new rule than ad hoc adjudication." *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511 103 S. Ct. 885, 893, 74 L. Ed. 2d 705 (1983).

Id. at 748. Significantly, even though *Pfaff* was decided before the court of appeals decision in *Chief Probation Officers v. Shalala*, it has not been overruled by that court. Indeed, the court in *Chief Probation Officers* analyzed several of its precedents in light of this Court's decision in *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), and it did not overrule, distinguish, or even discuss *Pfaff*.

The Fifth Circuit in *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001) has explicitly adopted the approach of the D.C. Circuit in *Alaska Professional Hunters Ass'n*. In *Shell*, the Interior Department's Minerals Management Service (MMS) had followed a policy since 1988 of allowing oil and gas lessees on the Outer Continental Shelf to deduct from their royalty payments the costs of transporting oil and gas to the market. In the case of producers such as Shell, which also owned its own pipeline system, this transportation cost was represented

by the tariff that Shell had filed with the pipeline regulatory authority, the Federal Energy Regulatory Commission (FERC). MMS' policy from 1988 to approximately 1993 was to accept any pipeline tariff filed with FERC as being "approved" by FERC. Beginning in 1994, however, MMS questioned whether FERC actually had jurisdiction over some of the pipelines that were being utilized by offshore producers. Accordingly, MMS informed its lessees, by sending "Dear Payor" letters to them, of an additional requirement – that of disallowing the "tariff exception" for transportation costs, unless the lessees first petitioned for and received from FERC a determination of jurisdiction.

The Fifth Circuit found that the new MMS policy did not directly or expressly contradict MMS' existing regulation setting forth the "approved by FERC" tariff policy. Rather, the court of appeals found that it contradicted its *prior consistent interpretation of the regulation*, 238 F.3d at 629, and that the change in policy had to be preceded by notice and comment rulemaking. The court of appeals found that the prior policy was substantive in nature, and that the change in policy was substantive as well:

> Even though Interior never set forth its interpretation of section 206.105(b)(5)'s "approved by FERC" in a written statement, it was undeniably its long established and consistently followed practice to accept tariffs filed with FERC as "approved" for purposes of section 206.105(b)(5). An agency that, as a practical matter, has enacted a new substantive rule cannot evade the notice and comment requirements of the APA by avoiding written statements or other "official" interpretations of a given regulation. *If a new agency policy represents a significant departure from long*

> *established and consistent practice that substantially affects the regulated industry, the new policy is a new substantive rule and the agency is obliged, under the APA, to submit the change for notice and comment. If Interior wishes to change its established practices and procedures in a manner that so significantly affects OCS lessees, it must give them notice and an opportunity to comment on the proposed change.* Interior's new practice may be a reasonable change in its oversight practices and procedures, but it places a *new and substantial requirement* on many OCS lessees, was a significant departure from long established and consistent past practice, and should have been submitted for notice and comment before adoption. Interior's new interpretation of "approved by [FERC]" in section 206.105(b)(5) accordingly meets the requirements for a new legislative rule under the APA.

238 F.3d at 630 (emphasis added, footnotes omitted).

The lesson to be drawn from the *Alaska Professional Hunters Ass'n*, *Pfaff* and *Shell Offshore* cases is clear: If the INS decides that its existing regulatory regime for the EB5 program is not accomplishing the statutory purpose, it is of course entitled to change the rules – but in the manner provided for by the APA, and not with retroactive application to those who have in good faith relied upon the agency's prior pronouncements. The rigid rule set forth by the Ninth Circuit in *Chief Probation Officers v. Shalala* invites abuse by administrative agencies that may enact substantial changes in the programs they administer if, by artful drafting, they are able to pass off their new policies as mere changes in interpretations of existing regulations, rather than the substantive changes that they actually effect.

This Court should accept review of this case to resolve the conflicts that exists between the circuits. To leave this conflict unresolved will lead to forum-shopping among the different circuits. In some cases, it will lead to inconsistent results even for parties in the same geographical area, depending on which court they seek review in.

B. The INS' Retroactive Application of the *Izumii* Decisions to the Petitioner and Its Investors Constitutes Arbitrary and Capricious Decisionmaking

The INS clearly signaled its intention to apply the *Izumii* decisions in adjudicating petitions to adjust previously filed petitions and petitions to remove conditions from the permanent resident status of, among others, the petitioner's investors. This Court should bar the application of those decisions to petitioner's investors who are in the process of petitioning for the removal of their conditional status. Because the investment program of those investors was approved by the INS under its then-existing regulations when their I-526 petitions were approved, and they made substantial investments on the basis of those approvals, the application of this new regulatory regime to those investors in the adjudication of their I-829 petitions constitutes the retroactive application of the new agency policy. As such, it is an arbitrary and capricious action under the APA.

1. Retroactive Application of New Rules Is Not Favored Under the Law

There is a presumption against the retroactive application of new laws that "'is deeply rooted in our

jurisprudence, and embodies a legal doctrine centuries older than our Republic' . . . . The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law making power to modify bargains it has made with its subjects." *Lynce v. Mathis*, 519 U.S. 433 (1997) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Moreover, the APA itself defines "rules" as having only "future effect." 5 U.S.C. § 551(4).

2. The INS Lacks Statutory Authority to Engage in Retroactive Rulemaking

Retroactive rulemaking is therefore disfavored, and the requirements for allowing it are quite high. A statute authorizing rulemaking "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. [citation omitted] Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988). The Immigration and Naturalization Act of 1990, which was comprehensively revised and enacted two years after the Supreme Court's decision in *Bowen*, contains no such express authority.[2] Presumably, Congress was aware of

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[2] The only rulemaking authority that specifically addresses the immigrant investor program is Section 203(b)(5)(C) of the Immigration and Naturalization Act, which authorizes the Attorney General, in consultation with the Secretary of Labor and the Secretary of State, to

(Continued on following page)

Bowen when it passed the INA in 1990 and chose to not grant retroactive rulemaking authority to the INS.

Since there is no express authority for retroactive rulemaking, this Court must determine whether the new rule will have retroactive effect. *Landgraf, supra*, set forth the "judicial default rules" for this determination: A new rule has retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280, 114 S.Ct. at 1505. The new standards set forth in the *Izumii* decisions, which imposed several additional requirements that impair the rights and increase the liability of petitioner's investors regarding actions they have undertaken over the past two years, clearly meet this test.

In particular, application of the "income tracing" rules enunciated in *Izumii* to petitioner's investors who hold conditional permanent resident status, and are faced with petitioning in the near future to have their conditional status removed, represents one of the most egregious abuses of the INS' rulemaking by adjudication. In most cases, those petitioners invested their funds more than two years ago, and the INS expressed no qualms about the source of those funds when it approved their petitions. Now, they are faced with reconstructing banking transactions that took place several years ago, in another country, involving banks and other financial institutions that they may no longer have any relationships with. It is precisely

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prescribe regulations increasing the dollar amount of capital to be invested by an immigrant investor. 8 U.S.C. § 1153(b)(5)(C).

this sort of injustice that the rule against retroactive rulemaking is supposed to prevent.

Finally, the INS has made no showing of what statutory interest will be advanced by applying the *Izumii* decisions retroactively, other than cryptic references to "some investment programs" being used to circumvent the Immigration and Naturalization Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. ALBERTSON
Counsel of Record
FORSBERG & UMLAUF, P.S.
900 Fourth Avenue, Ste. 1700
Seattle, Wash. 98164

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GOLDEN RAINBOW FREEDOM FUND, a Washington Limited Partnership, Plaintiff-Appellant, v. JOHN ASHCROFT,** Attorney General of the United States, Defendant-Appellee.	No. 00-36020 D.C. No. CV-99-00755-JCC **MEMORANDUM*** (Filed Nov. 26, 2001)

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding
Argued and Submitted November 6, 2001
San Francisco, California

Before: FERNANDEZ, RYMER, and WARDLAW, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** John Ashcroft is substituted for his predecessor, Janet Reno, as Attorney General of the United States. Fed. R. App. P. 43(c)(2).

Golden Rainbow Freedom Fund, a Washington limited partnership, brought this action for the purpose of challenging the Immigration and Naturalization Service's implementation of the Immigrant Investor Program, 8 U.S.C. § 1153(b)(5), and the associated Immigrant Investor Pilot Program, Pub. L. No. 102-395, § 610, 106 Stat. 1874 (1992), as amended Pub. L. No. 105-119, § 116(a), 111 Stat. 2467 (1997), and Pub. L. No. 106-396, § 402, 114 Stat. 1647 (2000). The district court granted summary judgment to the INS and Golden Rainbow appealed. We affirm.

First, we agree with Golden Rainbow that it has standing to assert is own claim for harm that it has allegedly suffered by reason of the position of the INS. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 445-46 (9th Cir. 1994); *Pac. N.W. Generating Coop. v. Brown*, 38 F.3d 1058, 1065-66 (9th Cir. 1994). That is true, even to the extent that its harm flows from the INS's actions toward third parties – the immigrant investors.[1] *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487-88 (9th Cir. 1995).

Second, we affirm the district court's decision on the merits for the reasons set forth in our decision in *R.L. Investment Limited Partners v. INS*, No. 00-15627, slip op. 15813 (9th Cir. Nov. 20, 2001).

However, one question raised here, but not properly raised in *R.L.*, requires special notice. That is retroactiv-

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[1] At argument, Golden Rainbow made it clear that it does not purport to represent those parties themselves on appeal.

ity. Clearly, retroactivity is the rule in adjudication, and "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S. Ct. 1575, 1581, 91 L. Ed. 1995 (1947). Of course, the mischief that a retroactive rule corrects must be balanced against the harm it might cause. *See id.; Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1328, 1333 (9th Cir. 1982).

No doubt, Golden Rainbow and the alien investors did rely on the non-precedential position of the INS, and may suffer on that account. But there had been no formal determination at the time, and they had to know that any initial approval was conditional. There could be no closure until there had been a second petition for removal of the condition, and a showing of compliance was required at that time. *See* 8 U.S.C. § 1186b(c)(1) & (d)(1). The long and short of it is that they lost their gamble that Golden Rainbow's creative financing approach would manage to get through the whole process. The INS finally acted to prevent a perversion of the program contemplated in the statutes and the regulations. The mischief that was avoided far outweighed any detriment to Golden Rainbow or anyone else. In other words, retroactivity was not inappropriate.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GOLDEN RAINBOW FREEDOM FUND, Plaintiff, v. JANET RENO, Defendant.	CASE NO. C99-0755C ORDER (Filed Sep. 13, 2000)

This matter comes before the Court on the parties' cross-motions for summary judgment. The material facts in this case are not disputed by the parties and are laid out in the underlying briefs. For the reasons detailed below, Defendant's motion for summary judgment is GRANTED and Plaintiff's motion for summary judgment is DENIED.

I. SUMMARY JUDGMENT

Rule 56 states that a party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The nonmoving party, if it has the burden of proof at trial, must present evidence sufficient to raise a genuine issue for trial. See *Celotex Corp v. Catreet,* 477 U.S. 317, 322 (1986). See also *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 154 (1970). In determining whether an issue of fact exists, all evidence and reasonable inferences must be viewed in the light most favorable to the nonmoving party. See *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986).

II. DISCUSSION

The central issue in this case is whether the INS (the "Service") legitimately issued adjudicatory decisions that were merely "interpretive" and therefore exempt from the rulemaking notice and comment procedure of the Administrative Procedure Act ("APA"). This is certainly not the first time that a court has been confronted with the rulemaking v. interpretive decision issue that arises out of numerous administrative actions, nor is this the first time a federal court has issued a ruling regarding the immigrant investor statute that is presently before this Court. See *R.L. Investment Limited Partners v. INS,* 86 F.Supp.2d 1014 (D.Hawaii 2000). This Court finds judge Mollway's analysis and holding, that INS's issuance of the precedent decisions ("Izumii") did not violate the APA or involve rulemaking, to be highly persuasive. *Id.*

Plaintiff argues that the INS substantially changed various key provisions of the Immigrant Investor Pilot Program regulations by way of the *Izumii* decisions. Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by *Izumii,* and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short-lived) interpretation of the statute . . . [which] [t]he Agency was free to change." *Chief Probation Officers v. Shalala,* 118 F.3d 1327, 1334 (9th Cir. 1997).

Unlike the "facially-clear" regulation in *Patel* that was passed after a comment period in which the Service expressly discarded the very requirement that was later sought to be added by way of an adjudicatory decision, the regulations at issue in this case already contained kernels of guidance upon which the Administrative Appeals Office

issued decisions interpreting the language in light of the specific facts of the selected cases before it. *Patel v. INS,* 638 F.2d 1199 (9th Cir. 1980). The Service must be allowed to apply the intent of Congress as put forth in skeleton, albeit never completely comprehensive, language of the statute with due regard for the practicalities of administering that intent on a case-by-case basis. This is precisely why the Supreme Court mandates that, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984).

The 9th Circuit makes it clear that "there is no steadfast rule of unreviewability in the immigration context," nevertheless, it also stated that, "[o]ur review is especially deferential in the context of immigration policy." *Socop-Gonzalez v. INS,* 208 F.3d 838, 845 (9th Cir. 2000), *Jang v. Reno,* 113 F.3d 1074, 1077 (9th Cir. 1997). Plaintiff's attempts to build a list of instances where the Service had developed what it argues is a "consistent expression of agency policy, the abrupt departure from which is not" allowed, simply fails when analyzed according to the law. *Plaintiff's brief pg. 4.* The Immigrant Investor Pilot Program did not have the same long-standing history as the system in *Alaska Professional Hunters Ass'n, Inc. v. FAA,* 177 F.3d 1030 (D.C. Cir. 1999), nor had there been any binding decisions regarding the program that set forth a settled course of adjudication from which an irrational departure is not allowed. *Socop-Gonzalez* at 844. Until there is a binding decision, this Court must heed the admonishment of the 9th Circuit to reject "the rigid view that an agency may not alter its interpretation in light of administrative experience." *Pacific First Federal Savings*

Bank v. Commission of IRS, 961 F.2d 800, 804 (9th Cir. 1992).

Contrary to what the plaintiff claims, "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein." *NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 765 (1969). The simple fact that the present policy of the INS is different from that of an earlier policy, as the plaintiff argues, does not automatically mean that the Service must submit it to the public for notice and comment. Administrative agencies are accorded the ability, within certain guidelines, to announce and apply new standards through adjudication without submitting them to notice and comment. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 290-5 (1974). This Court finds that by issuing the *Izumii* decisions the Service did not abuse its discretion in choosing to rely upon the APA "interpretive" decisions exception to the notice and comment procedure. Furthermore, the retroactive application of the *Izumii* decisions, as applied to Plaintiff, will not be disturbed. Therefore, the Court GRANTS Defendant's motion for summary judgment, and DENIES Plaintiff's motion for summary judgment.

SO ORDERED this 12 day of September, 2000.

/s/ John C. Coughenour
John C. Coughenour
Chief United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GOLDEN RAINBOW FREEDOM FUND, Plaintiff, v. JANET RENO, Defendant.	CASE NO. C99-755C JUDGMENT ON DECISION BY THE COURT (Filed Sep. 18, 2000)

This action came on for consideration before the court, United States District Judge John C. Coughenour presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

The Court GRANTS Defendant's motion for summary judgment, and DENIES

Plaintiff's motion for summary judgment.

DATED this 18th day of September, 2000.

BRUCE RIFKIN
Clerk of the Court

/s/ Stacy Lee Stapleton
By Stacy Lee Stapleton,
Deputy Clerk of Court

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GOLDEN RAINBOW FREEDOM FUND, a Washington Limited Partnership, Plaintiff-Appellant, v. JOHN ASHCROFT, Attorney General of the United States, Defendant-Appellee.	No. 00-36020 D.C. No. CV-99-00755-JCC ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (Filed Feb. 11, 2002)

Before: FERNANDEZ, RYMER, and WARDLAW, Circuit Judges.

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

5 U.S.C. Sec. 551. Definitions

* * *

- (4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;
- (5) "rule making" means agency process for formulating, amending, or repealing a rule;

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5 U.S.C. Sec. 553. Rule making

* * *

- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –
  - (1) a statement of the time, place, and nature of public rule making proceedings;
  - (2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply –

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections *556* and 557 of this title apply instead of this subsection.

* * *

8 U.S.C. Sec. 1153. Allocation of immigrant visas

* * *

- (b) Preference allocation for employment-based immigrants

  Aliens subject to the worldwide level specified in section *1151*(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

  * * *

  - (5) Employment creation

    - (A) In general

      Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise –

      - (i) which the alien has established,
      - (ii) in which such alien has invested (after November 29, 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

        (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens law-

fully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

- (B) Set-aside for targeted employment areas

  - (i) In general

    Not less than 3,000 of the visas made available under this paragraph in each fiscal year shall be reserved for qualified immigrants who establish a new commercial enterprise described in subparagraph (A) which will create employment in a targeted employment area.

  - (ii) "Targeted employment area" defined

    In this paragraph, the term "targeted employment area" means, at the time of the investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).

  - (iii) "Rural area" defined

    In this paragraph, the term "rural area" means any area other than an area within a metropolitan statistical area or

within the outer boundary of any city or town having a population of 20,000 or more (based on the most recent decennial census of the United States).

- (C) Amount of capital required
  - (i) In general

    Except as otherwise provided in this subparagraph, the amount of capital required under subparagraph (A) shall be $1,000,000. The Attorney General, in consultation with the Secretary of Labor and the Secretary of State, may from time to time prescribe regulations increasing the dollar amount specified under the previous sentence.

  - (ii) Adjustment for targeted employment areas

    The Attorney General may, in the case of investment made in a targeted employment area, specify an amount of capital required under subparagraph (A) that is less than (but not less than ½ of) the amount specified in clause (i).

  - (iii) Adjustment for high employment areas

    In the case of an investment made in a part of a metropoli-

tan statistical area that at the time of the investment –

- (I) is not a targeted employment area, and

(II) is an area with an unemployment rate significantly below the national average unemployment rate, the Attorney General may specify an amount of capital required under subparagraph (A) that is greater than (but not greater than 3 times) the amount specified in clause (i).

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8 C.F.R. § 204.6 Petitions for employment creation aliens.

* * *

(e) *Definitions.* As used in this section:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a noncommercial activity such as owning and operating a personal residence.

Employee means an individual who provides services or labor for the new commercial enterprise and who receives wages or other remuneration directly from the new commercial enterprise. In the case of the Immigrant Investor Pilot Program, "employee" also means an individual who provides services or labor in a job which has been created indirectly through investment in the new commercial enterprise. This definition shall not include independent contractors.

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week. In the case of the Immigrant Investor Pilot Program, "full-time employment" also means employment of a qualifying employee in a position that has been created indirectly through revenues generated from increased exports resulting from the Pilot Program that requires a minimum of 35 working hours per week. A job-sharing arrangement whereby two or more qualifying employees share a full-time position shall count as full-time employment provided the hourly requirement per week is met.

This definition shall not include combinations of part-time positions even if, when combined, such positions meet the hourly requirement per week.

High employment area means a part of a metropolitan statistical area that at the time of investment:

(i) Is not a targeted employment area; and

(ii) Is an area with an unemployment rate significantly below the national average unemployment rates.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

New means established after November 29, 1990.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Regional center means any economic unit, public or private, which is involved with the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment.

Rural area means any area not within either a metropolitan statistical area (as designated by the Office of Management and Budget) or the outer boundary of any city or town having a population of 20,000 or more.

Targeted employment area means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve- or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty percent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

* * *

(j) *Initial evidence to accompany petition.* A petition submitted for classification as an alien entrepreneur must be accompanied by evidence that the alien has invested or is actively in the process of investing lawfully obtained capital in a new commercial enterprise in the United States which will create full-time positions for not fewer than 10 qualifying employees. In the case of petitions submitted under the Immigrant Investor Pilot Program, a petition must be accompanied by evidence that the alien has invested, or is actively in the process of investing,

capital obtained through lawful means within a regional center designated by the Service in accordance with paragraph (m)(4) of this section. The petitioner may be required to submit information or documentation that the Service deems appropriate in addition to that listed below.

(1) To show that a new commercial enterprise has been established by the petitioner in the United States, the petition must be accompanied by:

(i) As applicable, articles of incorporation, certificate of merger or consolidation, partnership agreement, certificate of limited partnership, joint venture agreement, business trust agreement, or other similar organizational document for the new commercial enterprise;

(ii) A certificate evidencing authority to do business in a state or municipality or, if the form of the business does not require any such certificate or the State or municipality does not issue such a certificate, a statement to that effect; or

(iii) Evidence that, as of a date certain after November 29, 1990, the required amount of capital for the area in which an enterprise is located has been transferred to an existing business, and that the investment has resulted in a substantial increase in the net worth or number of employees of the business to which the capital was transferred. This evidence must be in the form of stock purchase agreements, investment agreements, certified financial reports, payroll records, or any similar instruments, agreements, or documents evidencing the investment in the commercial enterprise and the resulting substantial change in the net worth, number of employees.

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statements showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading, and transmit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or non-voting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

(4) *Job creation* – (i) *General.* To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

(ii) *Troubled business*. To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years. Photocopies of tax records, Forms I-9, or other relevant documents for the qualifying employees and a comprehensive business plan shall be submitted in support of the petition.

(iii) *Immigrant Investor Pilot Program*. To show that the new commercial enterprise located within a regional center approved for participation in the Immigrant Investor Pilot Program meets the statutory employment creation requirement, the petition must be accompanied by evidence that the investment will create full-time positions for not fewer than 10 persons either directly or indirectly through revenues generated from increased exports resulting from the Pilot Program. Such evidence may be demonstrated by reasonable methodologies

including those set forth in paragraph (m)(3) of this section.

(5) To show that the petitioner is or will be engaged in the management of the new commercial enterprise, either through the exercise of day-to-day managerial control or through policy formulation, as opposed to maintaining a purely passive role in regard to the investment, the petition must be accompanied by:

(i) A statement of the position title that the petitioner has or will have in the new enterprise and a complete description of the position's duties;

(ii) Evidence that the petitioner is a corporate officer or a member of the corporate board of directors; or

(iii) If the new enterprise is a partnership, either limited or general, evidence that the petitioner is engaged in either direct management or policy making activities. For purposes of this section, if the petitioner is a limited partner and the limited partnership agreement provides the petitioner with certain rights, powers, and duties normally granted to limited partners under the Uniform Limited Partnership Act, the petitioner will be considered sufficiently engaged in the management of the new commercial enterprise.

(6) If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:

(i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of

Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or

(ii) In the case of a high unemployment area:

(A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 CFR 204.6(i).

* * *

(m) *Immigrant Investor Pilot Program* – (1) *Scope.* The Immigrant Investor Pilot Program is established solely pursuant to the provisions of section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, and subject to all conditions and restrictions stipulated in that section. Except as provided herein, aliens seeking to obtain immigration benefits under this paragraph continue to be subject to all conditions and restrictions set forth in section 203(b)(5) of the Act and this section.

(2) *Number of immigrant visas allocated.* The annual allocation of the visas available under the Immigrant Investor Pilot Program is set at 300 for each of the five fiscal years commencing on October 1, 1993.

(3) *Requirements for regional centers.* Each regional center wishing to participate in the Immigrant Investor Pilot Program shall submit a proposal to the Assistant Commissioner for Adjudications, which:

(i) Clearly describes how the regional center focuses on a geographical region of the United States, and how it will promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment;

(ii) Provides in verifiable detail how jobs will be created indirectly through increased exports;

(iii) Provides a detailed statement regarding the amount and source of capital which has been committed to the regional center, as well as a description of the promotional efforts taken and planned by the sponsors of the regional center;

(iv) Contains a detailed prediction regarding the manner in which the regional center will have a positive impact on the regional or national economy in general as reflected by such factors as increased household earnings, greater demand for business services, utilities, maintenance and repair, and construction both within and without the regional center; and

(v) Is supported by economically or statistically valid forecasting tools, including, but not limited to, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and/or multiplier tables.

(4) *Submission of proposals to participate in the Immigrant Investor Pilot Program.* On August 24, 1993, the Service will accept proposals from regional centers seeking approval to participate in the Immigrant Investor Pilot Program. Regional centers that have been approved by the Assistant Commissioner for Adjudications will be eligible to participate in the Immigrant Investor Pilot Program.

(5) *Decision to participate in the Immigrant Investor Pilot Program.* The Assistant Commissioner for Adjudications shall notify the regional center of his or her decision on the request for approval to participate in the Immigrant Investor Pilot Program, and, if the petition is denied, of the reasons for the denial and of the regional center's right of appeal to the Associate Commissioner for Examinations. Notification of denial and appeal rights, and the procedure for appeal shall be the same as those contained in 8 CFR 103.3.

(6) *Termination of participation of regional centers.* To ensure that regional centers continue to meet the requirements of section 610(a) of the Appropriations Act, the Assistant Commissioner for Adjudications shall issue a notice of intent to terminate the participation of a regional center in the pilot program upon a determination that the regional center no longer serves the purpose of promoting economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. The notice of intent to terminate shall be made upon notice to the regional center and shall set forth the reasons for termination. The regional center must be provided thirty days from receipt of the notice of intent to terminate to offer evidence in opposition to the ground or grounds alleged in the notice of

intent to terminate. If the Assistant Commissioner for Adjudications determines that the regional center's participation in the Pilot Program should be terminated, the Assistant Commissioner for Adjudications shall notify the regional center of the decision and of the reasons for termination. The regional center may appeal the decision within thirty days after the service of notice to the Associate Commissioner for Examinations as provided in 8 CFR 103.3.

(7) *Requirements for alien entrepreneurs.* An alien seeking an immigrant visa as an alien entrepreneur under the Immigrant Investor Pilot Program must demonstrate that his or her qualifying investment is within a regional center approved pursuant to paragraph (m)(4) of this section and that such investment will create jobs indirectly through revenues generated from increased exports resulting from the new commercial enterprise.

(i) *Exports.* For purposes of paragraph (m) of this section, the term "exports" means services or goods which are produced directly or indirectly through revenues generated from a new commercial enterprise and which are transported out of the United States;

(ii) *Indirect job creation.* To show that 10 or more jobs are actually created indirectly by the business, reasonable methodologies may be used. Such methodologies may include multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.

(8) *Time for submission of petitions for classification as an alien entrepreneur under the Immigrant Investor Pilot Program.* Commencing on October 1, 1993, petitions will be accepted for filing and adjudicated in accordance with the provisions of this section if the alien entrepreneur has invested or is actively in the process of investing within a regional center which has been approved by the Service for participation in the Pilot Program.

(9) *Effect of termination of approval of regional center to participate in the Immigrant Investor Pilot Program.* Upon termination of approval of a regional center to participate in the Immigrant Investor Pilot Program, the director shall send a formal written notice to any alien within the regional center who has been granted lawful permanent residence on a conditional basis under the Pilot Program, and who has not yet removed the conditional basis of such lawful permanent residence, of the termination of the alien's permanent resident status, unless the alien can establish continued eligibility for alien entrepreneur classification under section 203(b)(5) of the Act.

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No. 01-1674

In the Supreme Court of the United States

GOLDEN RAINBOW FREEDOM FUND, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service (INS) violated the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553, when it interpreted its existing regulations governing the "EB-5" immigrant investor program in precedential adjudicatory decisions.

2. Whether the INS's adherence to its precedential adjudicatory decisions, when determining aliens' compliance with the requirements of the EB-5 program during the aliens' conditional residency in the United States, is an arbitrary and capricious retroactive application of those decisions.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is reprinted at 24 Fed. Appx. 698. The order of the district court (Pet. App. 4-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2001. A petition for rehearing was denied on February 11, 2002 (Pet. App. 9). The petition for a writ of certiorari was filed on May 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 203(b)(5) of the Immigration and Nationality Act (INA), 8 U.S.C. 1153(b)(5), which Congress enacted in 1990 (see Immigration Act of 1990, Pub. L. No. 101-649, § 121(a), 104 Stat. 4987), establishes the so-called "EB-5 program." The EB-5 program offers aliens known as "immigrant investors" a preference for a visa and the possibility of obtaining lawful permanent resident status in the United States. In order to qualify for the EB-5 program, an alien must "seek[] to enter the United States for the purpose of engaging in a new commercial enterprise * * * which the alien has established" and "which will * * * create full-time employment for not fewer than 10 United States citizens or [lawful alien workers]." 8 U.S.C. 1153(b)(5)(A). The alien must have "invested" or be "actively in the process of investing" at least $1,000,000 in the new commercial enterprise, unless the investment is to be made in a "targeted employment area," in which case the investment must be at least $500,000. 8 U.S.C. 1153(b)(5)(A)(ii) and (C)(i)-(ii).

In 1992, Congress required the Secretary of State and the Attorney General to establish an Immigrant Investor Pilot Program, under which an alien may qualify for EB-5 visa status by investing in a regional center in the United States "for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment." Act of Oct. 6, 1992, Pub. L. No. 102-395, § 610(a), 106 Stat. 1874, as amended by Visa Waiver Permanent Program Act, Pub. L. No. 106-396, § 402(a), 114 Stat. 1647 (*reprinted in* 8 U.S.C. 1153 note); see 8 C.F.R. 204.6(m) (implementing regulations).

b. Aliens who participate successfully in the EB-5 program may become lawful permanent residents of the United States in two steps. The alien first files with the Immigration and Naturalization Service (INS) an "I-526" visa petition setting forth information about himself and his proposed qualifying investment. See 8 C.F.R. 204.6(a) and (b). If the petition is granted, and if the alien is found eligible for a visa by a United States consular officer, then the alien is admitted (with his dependents) to the United States as a conditional permanent resident.[1]

In order to remove the condition on permanent residency, the alien must file an "I-829" petition with the INS within the 90-day period before the second anniversary of his admission to the United States. See 8 U.S.C. 1186b(a)(1) and (d)(2); see also 8 C.F.R. 216.6. The I-829 petition will be granted if the INS determines that the alien met and sustained the required investment and entrepreneurial activities throughout his conditional residency. See 8 U.S.C. 1186b(d)(1). If the I-829 petition is granted, then the alien receives full permanent resident status as of the second anniversary of his conditional admission to the United States. See 8 U.S.C. 1186b(c)(3)(B); 8 C.F.R. 216.6(d)(1). If, however, the INS determines that the alien did not meet and sustain his obligation to comply with the EB-5 requirements, then the I-829 petition must be denied, the alien's permanent resident status is terminated, and the alien may be placed into removal proceedings in which the INS must show by a preponderance of the evidence that its denial of the I-829 petition was correct. See 8

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[1] An alien whose I-526 petition is denied may appeal that decision to the INS's Administrative Appeals Unit (AAU). See 8 C.F.R. 103.3.

U.S.C. 1186b(c)(3)(C), (c)(3)(D) and (d)(1); 8 C.F.R. 216.6(d)(2).

2. In 1996 and 1997, the number of I-526 petitions filed by aspiring immigrant investors increased sharply, from 356 in Fiscal Year 1995 to 1290 in Fiscal Year 1997. See Supp. E.R. 26. Many of the petitions during this period presented complex arrangements under which organizations based in the United States recruited aliens seeking EB-5 residency to be limited partners, and used the aliens' capital in projects that were controlled by a general partner who was not seeking EB-5 residency benefits. See Supp. E.R. 29-30. Some of those I-526 petitions reflected financial arrangements that appeared to be contrary to the INS's EB-5 regulations set out at 8 C.F.R. 204.6. The INS undertook a review of the situation, and placed a temporary administrative hold on I-526 petitions that presented one or more of the questionable features. See E.R. 21-22; Supp. E.R. 29-30, 39-40.

During the summer of 1998, the INS published and designated as precedent a series of four AAU decisions that addressed substantive issues that had arisen under the EB-5 program.[2] See *In re Soffici*, Interim Dec. No. 3359, 1998 WL 471519 (Exam. Comm. June 30, 1998); *In re Izummi*, Interim Dec. No. 3360, 1998 WL 483977 (Exam. Comm. July 13, 1998); *In re Hsiung*, Interim Dec. No. 3361, 1998 WL 483978 (Exam. Comm. July 31, 1998); *In re Ho*, Interim Dec. No. 3362, 1998 WL 483979

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[2] INS regulations provide that the INS may designate particular AAU decisions to "serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the [INA]. Precedent decisions must be published and made available to the public." 8 C.F.R. 103.3(c).

(Exam. Comm. July 31, 1998). For present purposes, *Izummi* was the most important of the four decisions. The AAU held in *Izummi*, *inter alia*, that an alien has not made a qualifying "invest[ment]" for purposes of satisfying 8 U.S.C. 1153(b)(5) and 8 C.F.R. 204.6(e) if, before the end of his two-year period of conditional residency in the United States, the alien enters into an agreement that grants him the right to sell back to the enterprise the financial interest on which his I-526 petition depended, or that guarantees the alien a return on his financial contribution to the enterprise. Such arrangements, the AAU held, eliminate the risk associated with the alien's equity investment and convert it into a loan from the alien to the enterprise. The AAU further held that an alien who invests in an ongoing limited partnership has not "established" a new commercial enterprise within the meaning of 8 U.S.C. 1153(b)(5)(A)(i) unless the alien shows, in accordance with 8 C.F.R. 204.6(h)(3), that *his own* investment will increase the net worth or the number of employees of the existing business by at least 40%. 1998 WL 483977.

The INS took steps to accommodate aliens who had obtained approval of an I-526 petition before the issuance of *Izummi* and the other "precedent decisions," but whose investment did not comply with those decisions. Such aliens were allowed to file, within 90 days of receiving notice of the Attorney General's intent to terminate their conditional permanent resident status (see 8 U.S.C. 1186b(b)(1)), a new I-526 petition. If the INS approved the new I-526 petition, then the alien would be deemed to have remained in lawful, conditional permanent resident status. And if the alien obtained a new visa, then he could begin a new, two-year period of conditional residency pursuant to his second I-526 petition. See E.R. 151-152.

3. Petitioner is a limited partnership that sought to recruit aliens as EB-5 investors. See Pet. iii, 5-6. In 1996, the INS designated petitioner as a "regional center" under the Immigrant Investor Pilot Program. See Pet. 5; see also 8 C.F.R. 204.6(m)(3). That designation permitted aliens seeking EB-5 visas to file I-526 petitions, as limited partners of petitioner, "for new commercial enterprises located within [petitioner's] project to develop an air cargo and manufacturing facility in Jackson County, Oregon." E.R. 66. The INS specified, however, that its designation of petitioner as a regional center "does not reflect any determination by the [INS] on the merits of individual petitions filed by alien entrepreneurs under the Investor Pilot Program." *Ibid.*

On May 12, 1999, petitioner filed a complaint for injunctive and declaratory relief in the United States District Court for the Western District of Washington. The complaint alleged that, of the 90 immigrant investors who participated in petitioner's partnership and who filed an I-526 petition with the INS, approximately 40 had their petition approved, while approximately 30 petitions were approved but later revoked under the INS's 1998 precedent decisions, and the remaining 20 petitions were denied under the precedent decisions. E.R. 10. Petitioner asked the district court to overturn the four precedent decisions; to direct the Attorney General to approve I-526 and I-829 petitions filed by petitioner's limited partners; and to award petitioner damages and attorney's fees. E.R. 17-18.

The district court granted the INS's motion for summary judgment. Pet. App. 4-7. The district court rejected petitioner's argument that the 1998 precedent decisions were a departure from a consistently expressed prior policy and that the INS therefore was

required, under the Administrative Procedure Act (APA), 5 U.S.C. 553, to undertake a notice-and-comment rulemaking. See Pet. App. 5-7. The INS's approval of certain I-526 petitions filed by petitioner's limited partners, the court held, "simply represented the Agency's prior (short-lived) interpretation of the statute . . . [which] [t]he Agency was free to change." *Id.* at 5 (quoting *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327, 1334 (9th Cir. 1997)). The district court distinguished *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999), in which the District of Columbia Circuit found that an FAA policy could be changed only through a rulemaking. The INS's EB-5 program, the court explained, lacked "the same long-standing history" as the FAA policy at issue in *Alaska Hunters*. Pet. App. 6. The court noted that the EB-5 precedent decisions did not conflict with any "binding decisions regarding the [EB-5] program that set forth a settled course of adjudication." *Ibid.* The district court additionally rejected petitioner's argument that it is unlawful for the INS to apply the holdings of the precedent decisions to aliens who filed an I-526 petition before those decisions were issued. *Id.* at 7.

4. The court of appeals affirmed in an unpublished decision, adopting the reasoning of *R.L. Investment Ltd. Partners* v. *INS*, 273 F.3d 874 (9th Cir. 2001). Pet. App. 2. In *R.L. Investment*, the court of appeals in turn relied upon the decision of the district court in that case (upon which the district court in this case also relied, see *id.* at 5). See 273 F.3d at 874. The district court in *R.L. Investment* rejected a challenge, brought by an EB-5 limited partnership and an individual alien, to the INS's application of its 1998 precedent decisions. See *R.L. Inv. Ltd. Partners* v. *INS*, 86 F. Supp. 2d 1014,

1016 (D. Haw. 2000), aff'd, 273 F.3d 874 (9th Cir. 2001). The district court held in relevant part that, although the precedent decisions represented a departure from positions taken by the INS in unpublished decisions and internal memoranda, those earlier materials carried no precedential weight and did not bind the INS. Thus, the precedent decisions did not "effect[] a change in existing law" and violate the rulemaking requirements of the APA. 86 F. Supp. 2d at 1022, 1024-1025. The court further explained that earlier approvals of I-526 petitions that did not satisfy the requirements stated in the precedent decisions were "mistakes" that did not restrict the INS's ability to enforce what it believed to be the correct interpretation of Section 1153(b)(5) and its own implementing rules. *Id.* at 1024-1025.

Addressing the retroactivity issue raised by the petitioner in this case, but not raised by the plaintiffs in *R.L. Investment*, the court of appeals additionally held in this case (Pet. App. 2-3) that the application of the precedent decisions to aliens who were limited partners of petitioner (including aliens whose I-526 petitions had been approved before the precedent decisions) was not impermissibly retroactive. The court of appeals acknowledged that petitioner and its investors may have "rel[ied] on the non-precedential position of the INS" when they formulated their business arrangements. *Id.* at 3. But the court observed that "there had been no formal determination at the time, and they had to know that any initial [residency] approval was conditional." *Ibid.* Furthermore, "[t]here could be no closure until there had been a second [*i.e.*, I-829] petition for removal of the condition, and a showing of compliance was required at that time." *Ibid.* "The long and short of it," the court of appeals stated, is that the INS "finally acted to prevent a perversion of the [EB-5] program"

and, accordingly, petitioner and its alien limited partners "lost their gamble that [petitioner's] creative financing approach would manage to get through the whole process." *Ibid.*

5. On February 11, 2002, the court of appeals denied petitions for rehearing and rehearing en banc that were filed by petitioner. The panel unanimously denied the rehearing petition, and no judge requested a vote on the en banc petition. Pet. App. 9.

ARGUMENT

The court of appeals' unpublished decision in this case is correct and does not conflict with any decision of this Court or any other court. Further review is not warranted.

1. Petitioner correctly does not suggest that there is any disagreement in the lower courts about the application of the Administrative Procedure Act's requirements to the INS's EB-5 precedent decisions: The Ninth Circuit is the only court of appeals to have considered this specific issue, and it has unequivocally upheld the INS's approach. Nor does petitioner claim that the decision below conflicts with any decision of this Court. See, *e.g.*, *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99-100 (1995) (holding that interpretive rules may be issued without notice-and-comment rulemaking (see 5 U.S.C. 553(b)(A) and (d)(2)), although rulemaking is required before agency may "adopt[] a new position inconsistent with * * * existing regulations."). Instead, petitioner argues (Pet. 14-22) that there is a disagreement involving three courts of appeals about the general circumstances in which a federal agency, in order to change its interpretation of statutory or regulatory requirements, must employ the notice-and-comment rulemaking procedure of the

Administrative Procedure Act, 5 U.S.C. 553. There is, however, no circuit conflict that bears upon the outcome in this case.

The Ninth Circuit's central holding on the APA issue in this case is that the INS was not required to undertake a notice-and-comment rulemaking in order to depart from positions that had been stated in non-precedential INS decisions and memoranda, which had no binding force. See Pet. App. 2; *R.L. Inv. Ltd. Partners* v. *INS*, 86 F. Supp. 2d 1014, 1024-1025 (D. Haw. 2000), aff'd, 273 F.3d 874 (9th Cir. 2001). That holding is in accord with *Chief Probation Officers* v. *Shalala*, 118 F.3d 1327 (1997), where the Ninth Circuit held that a new agency policy did not have to be published for notice and comment, even though the new policy contradicted recent agency practice. *Id.* at 1333-1338. The Ninth Circuit explained in *Chief Probation Officers* that the earlier practice was not ratified through rulemaking procedures and lacked precedential force and, thus, "[t]he Agency was free to change that interpretation." *Id.* at 1334.

Contrary to petitioner's primary argument (Pet. 14-16), there is no material conflict between the Ninth Circuit's decision in this case and the D.C. Circuit's holding in *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (1999). In the *Alaska Hunters* case, Alaskan fishing and hunting guides challenged an FAA Notice to Operators that required guides who flew passengers to comply with federal commercial-pilot regulations. The Notice reversed an interpretation by the FAA's Alaska regional office, which had for approximately 35 years advised guide pilots that, in light of a 1963 decision by the Civil Aeronautics Board, they were not governed by the commercial-pilot regulations. *Id.* at 1031-1032. The D.C. Circuit

held that the FAA had over the years "given its [commercial-pilot] regulation a definitive interpretation, and later significantly revise[d] that interpretation," such that the FAA had in effect amended its regulations. This, the court held, required a notice-and-comment rulemaking. *Id.* at 1034.

As the D.C. Circuit explained in later cases, its determination that the FAA changed "a definitive interpretation" of its commercial-pilot regulations turned upon the facts that the advice given by FAA personnel in Alaska since the 1960s "was longstanding, uniform, and unambiguous," *Association of Am. R.R.* v. *Department of Transp.*, 198 F.3d 944, 947 (D.C. Cir. 1999), and was based upon a formal adjudication by an associate agency, *Hudson* v. *FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999). As petitioner notes (Pet. 19-21), the Fifth Circuit followed *Alaska Hunters* in *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622 (2001), and held that notice-and-comment procedures must be followed when an agency adopts a new policy that "represents a significant departure from long established and consistent practice that substantially affects [a] regulated industry." *Id.* at 630.[3]

None of the circumstances underlying the *Alaska Hunters* line of cases are present here. Petitioner can identify no binding rule, policy statement, or adjudicatory decision of the INS that establishes that petitioner's investment scheme was consistent with the

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[3] Petitioner also relies (Pet. 17) upon an inapposite passage from *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015 (D.C. Cir. 2000). There, the D.C. Circuit simply held that an agency document may be a "final" agency action subject to judicial review if the agency gives the document binding force, notwithstanding that the document was not the product of notice-and-comment procedures. 208 F.3d at 1020-1023.

statutory and regulatory EB-5 requirements.[4] The precedent decisions also did not depart from any long-standing INS policy: The EB-5 program was authorized by Congress in 1990, the Immigrant Investor Pilot Program was authorized in 1992, and the non-binding INS interpretations on which petitioner relies (see Pet. 3-6) date from the mid-1990s—close in time to the 1998 precedent decisions. Unlike the situation in *Alaska Hunters*, the INS's early interpretations of the EB-5 requirements did not find support in any authoritative decision by another agency. Moreover, as the district court and the court of appeals correctly held, the 1998 precedent decisions merely clarified the application of INS regulations to particular EB-5 proposals, and did not deviate from or add new requirements to the regulations.[5] See Pet. App. 5-6 ("[T]he regulations at issue

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[4] The unpublished adjudicatory decisions in which the INS approved I-526 petitions that would have been denied under the later precedent decisions have no precedential authority and did not bind the INS. See *R.L. Investment*, 86 F. Supp. 2d at 1022. Policy memoranda to INS field offices (see Pet. 6), which are not published in the *Federal Register* or officially promulgated, likewise lack the force of law. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000). The views of INS's General Counsel about the application of EB-5 requirements (see Pet. 3-4) also could not have established a binding policy, because INS regulations do not delegate to the General Counsel any authority to establish binding INS policy. See *R.L. Investment*, 86 F. Supp. 2d at 1022; 8 C.F.R. 100.2(a)(1), 103.1(b)(1); cf. *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 743 (1996) (suggesting that published opinion letter of agency's deputy chief counsel was insufficient to establish binding agency policy).

[5] This distinguishes *Pfaff* v. *United States Department of Housing & Urban Development*, 88 F.3d 739 (9th Cir. 1996). See Pet. 18-19. In *Pfaff*, the court of appeals found that the agency had departed from a definitive earlier interpretation that had been

in this case already contained kernels of guidance upon which the [AAU] issued decisions interpreting the language in light of the specific facts of the selected cases before it."); *R.L. Investment*, 86 F. Supp. 2d at 1024 ("The INS was not contravening any statute, regulation, or published decision."). Accordingly, the district court, affirmed by the court of appeals, correctly rejected petitioner's assertion that the precedent decisions reversed a "consistent expression of agency policy." Pet. App. 6 (quoting petitioner's brief); see *R.L. Investment*, 86 F. Supp. 2d at 1024-1025. The factual predicate underlying the decision in *Alaska Hunters* is absent in this case.

2. Petitioner additionally contends that applying the precedent decisions to aliens whose I-526 petitions had been approved constitutes an impermissible retroactive application of the decisions and, therefore, is arbitrary and capricious in violation of the APA.[6] Pet. 22-25. The court of appeals correctly rejected this argument as well. Pet. App. 3.

The court of appeals observed that "retroactivity is the rule in adjudication" (Pet. App. 3), because an ad-

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announced in the *Federal Register* after a notice-and-comment rulemaking proceeding. 88 F.3d at 748.

[6] Petitioner asks this Court to "bar the application of [the precedent] decisions to petitioner's investors who are in the process of petitioning for the removal of their conditional status." Pet. 22. The petitioner partnership, however, lacks standing to request relief on behalf of individual investors who have never been parties to this case. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party."). The court of appeals held only that petitioner "has standing to assert i[t]s own claim for harm that it has allegedly suffered by reason of the position of the INS." Pet. App. 2.

judicator generally makes a determination about the legal consequences of past conduct. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). As the court of appeals also noted (Pet. App. 3), petitioner could not have believed, based upon any binding interpretation by the INS, that its limited partnership arrangements satisfied the requirements of the EB-5 program: Before 1998, "there had been no formal determination" of the relevant issues. Moreover, limited partners of petitioner whose I-526 petitions were granted received only *conditional* permanent resident status, subject to their *future* showing of compliance with the EB-5 requirements in an I-829 petition. See 8 U.S.C. 1186b(c)(3)(C); see 8 C.F.R. 216.6(d)(2). Petitioner and its limited partners thus could not reasonably have pursued EB-5 benefits in the belief that the INS's past approval of an I-526 petition would prevent the INS from applying subsequent interpretations of 8 U.S.C. 1153(b)(5) and INS regulations in *future* I-829 proceedings. Indeed, the INS's application of the EB-5 precedent decisions in I-829 proceedings does not constitute a retroactive application of those decisions at all, because the alien's failure to comply with the EB-5 requirements *at any time* during the period of conditional residency—including at times after issuance of the precedent decisions—is grounds for rejecting an I-829 petition. See 8 U.S.C. 1186b(c)(3) and (d)(1)(C).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
FRANCIS W. FRASER
Attorneys

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